IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

Smt. Basra & Anr. **Versus** Shaukat Ali & Ors.

S.B. CIVIL REVISION PETITION NO.315/2003

DATE OF ORDER : 15/09/2006

Hon'ble Shri Justice Ajay Rastogi

Shri Ajeet Bhandari, for petitioners
None present for respondents

BY THE COURT:

Instant revision petition has been filed by the defendants-petitioners against the order dated 22nd October, 2002 whereby the application filed by the plaintiff under O.7 R.11 CPC for rejection of counter claim filed by the defendant was allowed and the defendants were directed to submit amended written statement within 15 days under the order impugned.

The plaintiff-non-petitioner No.1 filed a suit against the present petitioners and non-petitioner Nos.2 to 7 who were defendant Nos.1 to 8 in the plaint for partition. It was alleged in the plaint that the property described in Para 1 of the plaint was owned by Mohinuddin who was husband of defendant No.1 and father of the plaintiff, has made construction and the said property was undivided and after death of Mohinuddin, the defendants have failed to give his share for which plaintiff has prayed for decree for partition of the property and also for permanent injunction in relation to the disputed property. The defendant Nos. 1 to 8 filed written statement and also filed counter claim in which it was pleaded that there is other property including agricultural land which was ancestral which is not mentioned in the plaint. It was further pleaded that

the agricultural land mentioned in Para 2 of the additional plea was purchased in the name of plaintiff out of the funds of defendant No.1 as she was a Pardanashin lady and there is other property of which description was also made in their counter claim.

The plaintiff-respondent No.1 moved an application under O.7 R.11 CPC for rejection of the counter claim, which was allowed by the learned trial Judge vide order impugned dated 22nd October, 2002 holding that personal property of the plaintiff has been examined in the judgment dated 18th September, 2000 and so also in Suit No.33/2000, decided on 30th November, 2000 and also on the ground that unless the defendant seeks declaration with respect to property which they claim to be ancestral, no relief can be claimed by filing counter claim and accordingly, directed the defendant to submit the amended written statement.

Notices were issued by this court on 28th March, 2003 and further proceedings in the suit were stayed and the stay was finally made absolute on 16th March, 2004.

Counsel for petitioner submits that the counter claim, which has been filed by the defendants, is to be tried as a suit and can be cancelled after parties are permitted to lead evidence as provided under O.8 R.6A(2) where counter claim have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim, which has been completely over-looked by the learned trial Judge while passing the order impugned.

No one has put in appearance on behalf of respondents despite service.

I have considered the submission made by the counsel and perused the material on record.

A bare perusal of O.8 R.6A(2) indicates that where counter claim has been filed, same will have the effect as a cross-suit which may enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim

The learned trial Judge without taking note of relevant provision as referred to supra, has arrived to a conclusion in holding that in view of the judgment as referred to under the order impugned and so also in the absence of a proper declaration counter claim cannot be filed, such finding recorded, in my opinion, is not sustainable and could not be recorded unless the parties are permitted to lead evidence in support of their claim/counter claim which was submitted by the defendant in their written statement.

Consequently, the revision petition stands allowed. The order impugned dated 22nd October, 2002 is hereby quashed and set aside and the learned trial Judge is directed to proceed in the matter in accordance with law after taking their counter claim as a part of record.

[Ajay Rastogi],J.

FRBOHRA,JR.P.A.